IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25-7-2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
and
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.Nos.250 & 251 of 2000
..

The Commissioner of Income-tax,
Tamil Nadu-V, Chennai.
... Appellant.

vs.

M/s.Synergy Financial Exchange Ltd.,
98A, Dr.Radhakrishnan Salai,
Chennai 600 004. ... Respondent

Appeal filed against the order of the Income-tax Appellate Tribunal, A-Bench, Chennai dated 14.5.1999 in ITA Nos.1959 & 1696/Mds/1997 (Commissioner of Income Tax (Appeals)IV, Chennai dated 21.5.1997 ITA.184/1997-98 and Deputy Commissioner of Income Tax, Special Range IX, Madras-34 dated 21.3.1997 PA.No.G.I.R.No.47-012-CX-0345/1994-95.

For appellant : Mrs.Pushya Sitaraman
Sr.Standing Counsel (IT)

For respondent : Mr.M.P.Senthil Kumar
for Official Liquidator

WEB COPY

JUDGMENT

(Delivered by P.D.DINAKARAN,J.)

The Revenue filed the appeals challenging the order of the Income-tax Appellate Tribunal dated 14.5.1999 in ITA Nos.1959 & 1696/Mds/1997 raising the following questions of law:

https://hcservices.ecourts.gov.in/hcservices/

(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the assessee is entitled to 100% depreciation under section 32 (1)(ii) of the Income-tax Act, 1961 on gas cylinders and spindles?

(ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in deleting the disallowance of Rs.1,45,399/- being the provident fund payments applying the provisions of section 43B of the Income-tax Act, 1961?

2.1. The assessee is a company engaged in the business of leasing and hire purchasing. The assessee claimed 100% depreciation with regard to certain assets leased out, namely, gas cylinders and spindles. The assessing officer refused to grant 100% depreciation in respect of those assets on the ground that they should be used collectively and cumulatively, and not individually and in isolation. On appeal, the said finding of the assessing officer was confirmed by the Commissioner of Income-tax (Appeals).

2.2. Similarly, the assessing officer also disallowed the contributions made by the assessee toward provident fund under section 43B of the Income Tax Act (for brevity "the Act") on the ground that the payments made by the assessee after the due date under the relevant statute, viz., the Provident Fund Act, even though they were made during the accounting year would not be deductible as per the second proviso to Section 43 B of the Act then in force. On appeal, the Commissioner of Income-tax (Appeals) sustained the said disallowance.

2.3. The assessee preferred appeals before the Appellate Tribunal, which, by order dated 14.5.1999, accepted the contentions of the assessee on both the issues and allowed 100% depreciation on the gas cylinders and spindles and also allowed the payment of Provident Fund contributions under section 43B of the Act.

WEB COPY

2.4. Hence, the Revenue has preferred the above appeals, on the questions of law referred to above.

3.1. Point: (i) - Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the assessee is entitled to 100% depreciation under section 32 (1)(ii) of the Act, on gas cylinders and spindles?

3.2. Section 32 of the Act deals with depreciation of

https://hcservices.ecourts.gov.in/hcservices/

buildings, machinery, plant or furniture, etc., wholly or partly used for the business or profession for the purpose of deduction. As per the first proviso to Section 32(1) of the Act, which was in force during the assessment year in question and omitted by Finance Act, 1995, with effect from 1.4.1996, where the actual cost of any machinery or plant does not exceed five thousand rupees, the actual cost thereof shall be allowed as a deduction without any restriction, in respect of the previous year in which the machinery or plant is first put to use by the company for the purpose of its business or profession.

3.3. Section 43 of the Act defines certain terms relevant to income from profits and gains of business or profession. Sub-section (3) to Section 43 of the Act defines "Plant" as follows:

> Section:43. Definitions of certain terms relevant to income from profits and gains of business or profession.--In sections 28 to 41 and in this section, unless the context otherwise requires--
>
> (1)to (2) ...
>
> (3) "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession but does not include tea bushes or livestock.

3.4. The question that arises for our consideration is whether each gas cylinder or spindle for which the assessee claims 100% depreciation under Section 32(1)(ii) of the Act satisfies the definition of 'plant' as defined under Section 43(3) of the Act.

3.5. In Yarmouth v. France [1887] 19 QBD 647, the meaning of plant was explained as under:

> " .. in its ordinary sense the word includes whatever apparatus is used by a businessman for carrying on his business other than the stock-in-trade which he buys or makes for sale and that it includes all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business".

3.6. In CIT v. Taj Mahal Hotel, [1971] 82 ITR 44 (SC), while deciding whether a sanitary and pipeline fittings installed in a hotel could be treated as plant, the Apex Court answering the question in affirmative held that the intention of the Legislature was to give the expression a very wide meaning.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

3.7. The Gujarat High Court in CIT v. Elecon Engineering Co. Ltd., [1974] 96 ITR 672, held the word 'plant' in its ordinary meaning is a word of wide import and it must be broadly construed having regard to the fact that articles like books and surgical instruments are expressly included in the definition of plant in section 43(3) of the Act. It includes any article or object, fixed or movable, live or dead, used by a businessman for carrying on his business. It is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. It would not, however, cover the stock-in-trade, that is, goods bought or made for sale by a businessman. It would also not include an article which is merely a part of the premises in which the business is carried on. An article to qualify as 'plant' must furthermore have some degree of durability and that which is quickly consumed or worn out in the course of a few operations or within a short time cannot properly be called plant. But an article would not be any the less plant because it is small in size or cheap in value or a large quantity thereof is consumed while being employed in carrying on business. In the ultimate analysis, the inquiry which must be made is as to what operation the apparatus performs in the assessee's business. The relevant test to be applied is : does it fulfil the function of plant in the assessee's trading activity? Is it the tool of the taxpayer's trade? If it is, then it is plant, no matter that it is not very long-lasting or does not contain working parts such as a machine does and plays a merely passive role in the accomplishment of the trading purpose. The above view was also confirmed by the Apex Court in Commissioner of Income-tax v. Elecon Engineering Co. Ltd. [1987] 166 ITR 66.

3.8. Agreeing with the decisions, in (i) Yarmouth v. France [1887] 19 QBD 647; (ii) CIT v. Taj Mahal Hotel [1971] 82 ITR 44 (SC); and (iii) CIT v, Elecon Engineering Co. Ltd., [1974] 96 ITR 672, the Delhi High Court in C.I.T. v. National Air Products Ltd., [1980] 126 ITR 196 held that gas cylinders clearly fall within the scope of the definition of 'plant' defined under Section 43(3) of the Act and depreciation was allowable on gas cylinders at 100%.

3.9. A Division Bench of this Court in First Leasing Co. of India Ltd. v. CIT, [2000] 164 CTR 179: [2000] 244 ITR 238, held that each bottle was an independent unit and was not dependent for its user on the availability of other bottles whether empty or filled. The use of one bottle was not interconnected with the use of another bottles. Since each bottle was an individual unit and all bottles together did not constitute a single integrated unit, depreciation under the proviso to Section 32(1) (ii) of the Act was allowable.

3.10. Another Division Bench of this Court in CIT Vs. Alagendran Finance Ltd, [2004] 186 CTR 102 : [2003] 264 ITR 269

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

considered the decision in First Leasing Co. of India Ltd. v. CIT, referred supra, and took the same view.

3.11. This Bench, after referring to the decisions in First Leasing Co. of India Ltd. v. CIT and CIT Vs. Alagendran Finance Ltd, referred supra, has also taken a similar view in CIT v. Upasana Finance Ltd., [2006] 202 CTC 383, and held that on printing cylinders, MS bins and Shippers Sintex Ice Boxes, depreciation of 100% is allowable under the first proviso to Section 32(1) (ii) of the Act, and each of these assets is a plant individually as defined under Section 43(3) of the Act.

3.12. Of course, an argument was advanced by Mrs.Pushya Sitaraman, learned Senior Standing Counsel appearing for the Revenue that spindles, unless fit into other accessories, cannot be considered as a plant by itself independently. But, we are unable to appreciate the said contention because the Gujarat High Court in Aruna Mills Ltd., v. Commr. Of Income Tax, [1966] 59 ITR 507, while dealing with replacement of ordinary spindles by roller bearing spindles, held that though spindles were not self-contained units, they must be held to be machinery and therefore, the expenditure incurred in their purchase and in substituting them for the old spindles would be entitled to development rebate.

3.13. That apart, this Court in CIT v. Upasana Finance Ltd, referred supra, in the case of printing cylinders, which are mainly used in the printing industry, held that, the matter to be printed using the printing cylinders are screwed on to these cylinders and then prints are taken and therefore the printing cylinders were being used as part of the plant within the definition of Section 43(3) of the Act. We are of the considered opinion that the same analogy is applicable in the case of spindles also.

3.14. The first question of law is answered in affirmative in favour of the assessee.

4.1. Point (ii): Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in deleting the disallowance of Rs.1,45,399/- being the provident fund payments applying the provisions of section 43B of the Income-tax Act, 1961?

4.2. As per section 43B of the Act, certain deductions are allowable only on actual payment. For the purpose of present appeal, we are concerned only with the deduction claimed by the assessee towards payment of Provident Fund under section 43B of the Act. Section 43B(b) of the Act provides that any sum payable by the assessee as an employer by way of contribution to any

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed [irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him] only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him.

4.3. During the relevant assessment year, namely, 1994-95, the second proviso to section 43-B, as then in force, of course, which stands omitted by the Finance Act, 2003 with effect from 1.4.2004, imposed a further condition that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date.

4.4. Explanation to clause (va)

> "Explanation - For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise."
>
> (Emphasis supplied)

4.5. By Finance Act, 2003, which came into force from 1.4.2004, the said second proviso to section 43-B was omitted the result being, the assessee is entitled to the deduction of payment made towards provident fund, etc. when such payment is actually made by the assessee on or before the due date applicable for filing return, irrespective of the fact that such payment is made on or before the due date by which the assessee is required to credit the contribution to the employee's account in the relevant fund under the relevant Act.

4.6. Mr.Senthilkumar, learned counsel for the assessee contends that in view of the deletion of second proviso to section 43B of the Act, the assessee is entitled to deduction even if the assessee made the provident fund contribution after the due date as mentioned in the relevant Act and for the purpose of claiming deduction, it is sufficient that the provident fund contribution is made before the due date for furnishing the return. According to the learned counsel for the assessee, the deletion of second proviso to section 43B by the Finance Act, 2003 with effect from

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

1.4.2004, should be given retrospective operation so as to make it applicable to the impugned assessment year 1994-95.

4.7. It is the cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation (vide: Gem Granites v. Commr. Of Income Tax, (2005) 1 SCC 299, p.296). As a logical corollary of the general rule that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary (vide: Shyam sunder v. Ram Kumar AIR 2001 SC 2472 pp.2481, 2482: (2001) 8 SCC 24).

4.8. Of course, it is always not necessary, as contended by Mr.Senthilkumar, learned counsel for the assessee, an express provision be made to make a statute retrospective and the presumption against the retrospective operation may be rebutted by necessary implication, especially in a case where a new law is made to cure an acknowledged evil for the benefit of the community as a whole (vide: Zile Singh v. State of Haryana (2004) 8 SCC 1, p.9). But, for this, there should be materials to show that the legislature intended to cure the acknowledged evil or to remove any such hardship. In other words, the real issue in each case is as to the dominant intention of the legislature to be gathered from the tests, viz.,

(i) the language used;

(ii) the object intended;

(iii) the nature of rights affected; and

(iv) the circumstances under which the statute is passed.

4.9. We are constrained to examine the instant case on the basis of above tests. The second proviso to section 43B of the Act, which stands omitted by the Finance Act, 2003 with effect from 1.4.2004, related to a condition imposed on the assessee to claim deduction of statutory contribution. The condition under the said second proviso is that to claim deduction, the assessee should make payment towards the contribution before the due date under the relevant Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.

4.10. It is a well-settled principle in law that the Court

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said [vide: Sangeeta Singh v. Union of India,(2005) 7 SCC 484].

4.11. When Parliament enacts law, the law must be understood with reference to the language used in the provision construed in the light of the scheme of the Act and the object of the statute and the provisions therein. If it is with a view to confer a benefit which had not been conferred before the law was amended, that does not necessarily imply that the amendment is to be given retrospective effect even without a legislative declaration to that effect [vide: C.W.T. v. Varadharaja Theatres Pvt. Ltd.(250 ITR 523)].

4.12. It is a settled law that the fiscal legislation imposing liability is generally governed by normal presumption that it is not retrospective (vide: Halsbury's Law of England (3rd Edn.) Vol.36, p.425, Union of India v. Madan Gopal AIR 1954 SC 158: 1954 SCR 541). It is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication (vide: Reliance Jute and Industries Ltd. v. CIT AIR 1980 SC 251, p. 252: 1980 (1) SCC 139). The above rule is applicable not only to the charging section, but also other substantive provision such as, the provision imposing penalty and it does not apply to machinery or procedural provisions of a taxing Act which are generally retrospective and apply even to pending proceedings (vide: C.W.T., Meerut v. Sharvan Kumar Swarup, 210 ITR 886), because the assessment creates a vested right and the assessee cannot be subjected to reassessment unless a provision to that effect is inserted either expressly or by necessary implication retrospectively (vide: Controller of Estate Duty Gujarat-I v. M.A.Merchant, AIR 1989 SC 1710, p.1713: 1989 Supp (1) SCC 499). The same logic is also available to a statutory liability. A provision which in terms is retrospective and has the effect of opening up liability which had become barred by lapse of time, will be subject to the rule of strict construction (vide: CIT., Bombay v. Onkarmal Meghraj, AIR 1973 SC 2585, p.2589, 25890: (1974) 3 SCC 349).

4.13. We have also gone through the Budget Speech of the Hon'ble Minister for Finance for the year 2003-04, the Notes on

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Clauses of Finance Bill, 2003 dealing with section 43B and the Memorandum explaining the provisions in the Finance Bill, 2003 dealing with section 43B of the Act, and we find that they do not help the assessee to satisfy either of the above tests in favour of the assessee. It is therefore not permissible in law to take a liberal view or lenient approach to give retrospective effect to the deletion of second proviso to section 43B of the Act so as to apply the same to the assessment year 1994-95, particularly when there is no indication in the Finance Act, 2003 from the language used and from the object indicated that the legislature intended expressly or by implication that the second proviso to section 43B was deleted to cure an acknowledged evil for the benefit of the community as a whole or to remove any such hardship, nor there is any express provision in the statute that such deletion of second proviso to section 43B of the Act will have any retrospective effect.

4.14. Mr.Senthilkumar, learned counsel for the assessee took us through the Report of the Task Force on Direct Taxes, reported in [(2003) 179 CTR (St.) 5] whereunder it was recommended to delete the second proviso to section 43B of the Act, but, unless there is any material to show that the said recommendation in the report of the Task Force on Direct Taxes was accepted by the legislature, it will be difficult for us to come to the conclusion that the impugned deletion of second proviso to section 43B of the Act was intended to cure the acknowledged evil or to remove the hardship. In any event, it is trite law that a taxing Act cannot, however, be called retrospective if it taxes an event which is continuing and not complete when the Act comes into force.

4.15. In support of his submission that the deletion of second proviso to section 43B of the Act has to be given retrospective effect, Mr.Senthilkumar, learned counsel for the assessee relied upon the decision of the Apex Court in ALLIED MOTORS (P) LTD. v. C.I.T. (224 ITR 677) wherein it is held that the first proviso to section 43B of the Act and Explanation 2 have to be read together as giving effect to the true intention of section 43B of the Act and the Explanation 2 being retrospective, the first proviso has also to be so construed. The Apex Court was dealing with a case relating to the payment of sales tax made by the assessee after the end of previous year, but within the time allowed under the relevant sales-tax law. In the factual situation, the Apex Court held that the first proviso to section 43B of the Act has to be treated as retrospective. In so far as the first proviso to section 43B of the Act is concerned, it deals with statutory liability, such as sales tax liability. The first proviso to section 43B was introduced to remove the hardship caused to certain tax payers who had represented that since the sales tax for the last quarter cannot be paid within the previous

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

year, the original provisions of section 43B would unnecessarily involve disallowance of the payment for the last quarter. The situation is not the same in the case of payment of contribution towards provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees. Therefore, we are unable to accept the submission of the learned counsel for the assessee in this regard.

4.16. The test to be applied for deciding as to whether a later amendment should be given retrospective efect, despite a legislative declaration specifying a prospective date as the date from which the amendment is to come into force, is as to whether without the aid of the subsequent amendment the unamended provision is capable of being so construed as to take within it's ambit the subsequent amendment [vide: CWT v. B.R.THEATRES AND INDL. CONCERNS P. LTD. (272 ITR 177)].

4.17. In the instant case, the unamended provision enables the assessee to pay contribution towards provident fund, superannuation fund, gratuity fund, etc. before the due date under the respective enactments, whereas the amended provision, due to the omission of second proviso to section 43-B of the Act, enables the assessee to pay contribution to provident fund, superannuation fund, gratuity fund, etc. before the filing of the return. In other words, if the assessee fails to pay contribution to the provident fund, superannuation fund, gratuity fund, etc. before the due date under the relevant Act is not entitled to the deduction without the aid of subsequent amendment, because only by way of subsequent amendment, due to the omission of the second proviso to section 43-B of the Act, the assessee is able to get deduction of payments made towards provident fund, superannuation fund, gratuity fund, etc. even if the payments were made after the due date under the relevant enactment. Hence, the benefit conferred under the amended provision cannot be said to be taken care of by the unamended provision. Applying the above test to the facts of the present case, we are of the view that it is not possible to hold that without the aid of the subsequent Finance Act, 2003 by which the second proviso to section 43-B was omitted, the unamended provision of section 43-B would allow the deduction of payment of provident fund, etc. when such payment was made by the assesseee on or before the due date applicable for filing return.

4.18. Unless there is an amendment which is clarificatory or declaratory in nature, for the removal of doubts, the same cannot be read into the main provision with effect from the time when the main provision came into force [vide: SEDCO FOREX INTERNATIONAL DRILL INC. v. CIT (279 ITR 310)]. But, in the instant case, there is no material available to hold that the impugned deletion is

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

either clarificatory or declaratory or intended for the removal of doubts to give a consequential retrospective effect to the impugned deletion so as to make it applicable to the assessment year 1994-95.

4.19. This Court in C.I.T. v. MADRAS RADIATORS AND PRESSINGS LTD. (264 ITR 620), after considering the same provisions of law, viz., sections 43B and 36(1)(va) of the Act, held that the disallowance of provident fund contribution made after the due date prior to the Finance Act, 2003 is justified.

4.20. The Kerala High Court in C.I.T. v. Standard Tile and Clay Works P. Ltd. (265 ITR 525) held that the assessee was not entitled to deduction of the contribution to the provident fund for the assessment year 1991-92 as the payment made was not within the due date as defined in the Explanation to section 36(1)(va) of the Income-tax Act, 1961.

4.21. In Halmira Estate Tea Pvt. Ltd. v. C.I.T. (268 ITR 498) the Calcutta High Court held that the provident fund contribution not made within the due date, cannot be allowed as a deduction in view of section 43B of the Income-tax Act, 1961.

4.22. The Calcutta High Court in C.I.T. v. Sudera Services Pvt. Ltd. (268 ITR 505) again held that so long as clause (b) of section 43B of the Income-tax Act, 1961, and the Explanation exist in unmodified terms in the statute book, provident fund contributions must be made within the due date for those to qualify for deductions under the Income-tax Act.

4.23. In C.I.T. v. Udaipur Distillary Co. Ltd. (274 ITR 429) a Division Bench of Rajasthan High Court held that in order to avail the benefits of deduction under clause (b) of section 43B in respect of contributions to the provident fund, superannuation fund and gratuity fund or any other funds for the welfare of the employees, the sums are not only to be actually paid before the end of the previous year but are further required to be paid within the time stipulated under the relevant statute or notification, standing order, award, contract of service or

WEB COPY

otherwise and if the payments have not been made within the stipulated time, the deduction cannot be claimed at any time thereafter.

4.24. For all these reasons, we answer the second question of law in favour of the Revenue and against the assessee.

https://hcservices.ecourts.gov.in/hcservices/

5. In the result, the first question of law referred is answered in the affirmative, against the Revenue and in favour of the assessee. The second question of law is answered in the negative, in favour of the Revenue and against the assessee. The appeals are disposed of accordingly. No costs.

Sasi/na

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Assistant Registrar,
   Income-tax Appellate Tribunal,
   Rajaji Bhavan, Besant Nagar,
   Chennai (5 copies with records)
2. The Secretary, Central Board of Direct Taxes,
   New Delhi (3 copies)
3. The Commissioner of Income-tax (Appeals)-IV,
   Madras.
4. The Commissioner of Income-tax, Tamil Nadu-V,
   Madras.
5. The Deputy Commissioner of Income-tax, Spl.Range IX,
   Madras.

1 cc to Mrs.Pushya Sitaraman, Advocate, SR.32784
1 cc to Mr.M.P.Senthil Kumar, Advocate, SR.32737

km (co)

dv/30.8.06

T.C.Nos.250 & 251 of 2000

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/